

No. 78-1247

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

IMPERIAL DISTRIBUTORS, INC., ET AL., PETITIONERS

v.

HONORABLE RAYMOND J. PETTINE, JUDGE, UNITED STATES
DISTRICT COURT, DISTRICT OF RHODE ISLAND

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A-1) is not reported. The opinion of the district court (Pet. App. A-2 to A-8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1979. The petition for a writ of certiorari was filed on February 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly declined to issue a writ of mandamus to require the district court to adjudicate petitioners' motion for return of property.

STATEMENT

Petitioners are two Rhode Island corporations and one individual allegedly involved in the business of distributing and transporting obscene material in interstate commerce in violation of 18 U.S.C. 1465. On February 28, 1978, FBI agents in Massachusetts, acting pursuant to a search warrant, intercepted petitioners' truck containing allegedly obscene films, books, and magazines.¹ The agents seized these items and arrested the driver.² Thereafter other FBI agents obtained a search warrant covering various business records and obscene materials thought to be located at petitioners' establishment in Rhode Island. In addition to the information supporting the first search warrant, see note 1 *supra*, the affidavit supporting the Rhode Island search warrant detailed with particularity the obscene magazines and films seized in Massachusetts.

Subsequently, petitioners moved in the United States District Court for the District of Rhode Island to compel the government to return the materials seized in Rhode Island, which in the interim had been transferred to FBI headquarters in Boston for use in a grand jury proceeding then contemplated in the District of Massachusetts. Petitioners' motion, based on Rule 41(e) of the Federal Rules of Criminal Procedure, asserted that some of the property seized was not described in the warrant, that the warrant was not supported by probable cause, and that

¹The affidavit supporting this seizure described in detail the results of an extensive investigation into petitioners' distribution of obscene materials in Massachusetts. In particular, the affidavit recited the agents' personal knowledge that a truck bearing Rhode Island commercial license number 91826, which was regularly used by petitioners to distribute allegedly obscene materials, had been loaded at petitioners' premises on the morning of February 28. A copy of this affidavit, together with the affidavit supporting the Massachusetts search warrant, has been lodged with the Clerk of this Court.

²The government later dismissed the prosecution against the driver.

the seizure violated the First Amendment. Following an evidentiary hearing, the district court decided to abstain from adjudicating petitioners' contentions in order to "avoid the likely conflicts of jurisdiction between federal district courts and prevent simultaneous and duplicative litigation" (Pet. App. A-8). The court, however, retained jurisdiction of the case "pending the return of an indictment and/or the decision of the Massachusetts district court as to the validity of the contested warrants" (*ibid.*). The court of appeals summarily denied petitioners' request for a writ of mandamus directing the district court to rule on the motion for return of property (*id.* at A-1).

ARGUMENT

Petitioners contend (Pet. 17-27) that the court of appeals abused its discretion in declining to issue a writ of mandamus in this case. But "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations," and is "in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. United States District Court*, 426 U.S. 394, 402, 403 (1976). In addition, petitioners, as the moving parties, have the heavy burden of showing that their entitlement to a writ of mandamus is clear and indisputable. See, e.g., *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 662 (1978). Because, in the peculiar circumstances of this case, petitioners failed to carry their burden of persuasion, the court of appeals correctly declined to issue the writ, and further review by this Court is unwarranted.

As required by Fed. R. Crim. P. 41(e), petitioners moved in the district court in Rhode Island for a return of their property (mostly business records) seized in Rhode Island. The district court recognized, however, that a grand jury investigation into petitioners' activities was pending in another district and might soon lead to the

institution of criminal charges,³ that this proceeding would necessarily determine all of the issues raised by petitioners in their Rule 41(e) motion, and that, indeed, the property whose return petitioners were seeking had previously been transferred to that district. Thus, rather than risk duplicative and potentially conflicting judicial decisions, the district court reasonably chose to stay the proceedings pending resolution of the same issues by another coordinate court within the same circuit. See *Meier v. Keller*, 521 F. 2d 548, 554-555 (9th Cir. 1975); *Oliver v. United States*, 239 F. 2d 818, 823-824 (8th Cir.), cert. dismissed, 353 U.S. 952 (1957); *United States v. Lester*, 21 F.R.D. 30 (S.D.N.Y. 1957). See also *Hunsucker v. Phinney*, 497 F. 2d 29, 34-35 (5th Cir. 1974), cert. denied, 420 U.S. 927 (1975); *Smith v. Katzenbach*, 351 F. 2d 810, 814-815 (D.C. Cir. 1965); 3 C. Wright, *Federal Practice and Procedure* § 673, at 109-110 (1969) (concluding that Rule 41(e) is subject to equitable considerations). As this Court has only recently reiterated, the decision to stay a potentially duplicative action is largely committed to the sound discretion of the district court. *Will v. Calvert Fire Insurance Co.*, *supra*, 437 U.S. at 663-664. See also *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183-185 (1952); *Landis v. North American Co.*, 299 U.S. 248, 254-255, 258-259 (1936).

There is no merit to petitioners' claim that the district court's refusal to rule upon their Rule 41(e) motion abridged their First Amendment rights. Virtually all of the materials seized in Rhode Island were business

³We have been informed that the grand jury investigation in the District of Massachusetts will be concluded within the next two or three months and that much of the delay involved in this proceeding is attributable to petitioners' actions, including petitioner Guarino's contempt of court for refusing to turn over handwriting exemplars to the grand jury. *In re Guarino*, M.B.D. No. 78-156 (D. Mass. Mar. 14, 1979).

records,⁴ whereas all of the materials taken from the truck in Massachusetts were films, books and magazines alleged to be obscene.⁵ Nonetheless, petitioners have never attempted to vindicate their First Amendment rights by filing a Rule 41(e) motion in the district court in Massachusetts in the 13 months that have elapsed since the seizure of the truck.⁶ In light of the availability of this adequate remedy, the court of appeals did not abuse its discretion in refusing to grant an extraordinary writ to

⁴Contrary to petitioners' suggestion (Pet. 13), the government has not unfairly deprived petitioners of their business records. The government is entitled to retain lawfully seized evidence pending completion of criminal proceedings. See *Warden v. Hayden*, 387 U.S. 294 (1967); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). Moreover, here the government has not prevented petitioners from all access to the records in question. Petitioners were informed that they could inspect and use these documents subject to supervision by the FBI to protect against alteration and destruction of evidence. In addition, following several discussions among petitioners' counsel and the two United States Attorneys' offices, the government offered copies of needed documents at no cost to petitioners. Petitioners have not attempted to make use of either of these proposals (Pet. App. A-5).

⁵Apparently the only allegedly obscene materials taken from the Rhode Island premises were 45 copies of films and magazines identical to those previously seized in the truck. Petitioners do not contend that the FBI agents emptied their warehouse of all materials arguably within the search warrant. That substantial quantities of the same publications and films were left behind negates any suggestion that the seizure was for censorship rather than evidentiary purposes. See *Heller v. New York*, 413 U.S. 483, 492-493 (1973).

⁶Petitioners suggest (Pet. 10, 27) that because the truck only carried goods directly connected to Imperial Distributors, Inc., the other two petitioners could not vindicate their rights in Massachusetts. But petitioners are interrelated co-conspirators distributing the same materials out of the same premises. Moreover, since the few books and films seized in Rhode Island were identical to those seized in Massachusetts, a declaration by the district court in Massachusetts that the materials at issue were not obscene would benefit all three petitioners.

order the district court to decide petitioners' motion.⁷ Cf. *Echols v. United States*, 577 F. 2d 308 (5th Cir. 1978), cert. denied, No. 78-757 (Feb. 26, 1979).⁸

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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⁷We note that petitioners may also return to the Rhode Island district court, which has retained jurisdiction over this controversy, and ask for reconsideration of their motion for return of property in light of the intervening delay in Massachusetts.

⁸Contrary to petitioners' contention (Pet. 25), *Echols v. United States, supra*, is not in conflict with this case. *Echols* indicated only that Rule 41(e) was available to allow a defendant to protect his First Amendment rights prior to trial. Nothing in the opinion suggests that the Fifth Circuit would issue a writ of mandamus in the particular circumstances presented here. Indeed, the Fifth Circuit has previously indicated that the exercise of the district court's power to order the return of property alleged to have been unlawfully seized is subject to equitable considerations. See *Hunsucker v. Phinney, supra*.